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No. 93-833

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

OPERATION RESCUE, *et al.*,
Petitioners,
v.
WOMEN'S HEALTH CENTER, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Florida

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REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

ARGUMENT

Introduction

Respondents Women's Health Center, Inc., *et al.*, in their Brief in Opposition do not take issue with the "certworthiness" of this case or of the questions presented. Rather, respondents only challenge the ripeness of this particular petition for certiorari on behalf of these particular petitioners, namely, Operation Rescue, Patrick Mahoney, Randall Terry, and Bruce Cadle (hereafter, "OR et al.").[1]

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[1] None of these parties is a corporation. *See* Rule 29.1.

Respondents' concerns about the prematurity of this petition are unfounded. Accordingly, this Court should grant the petition for a writ of certiorari in this case (as well as in the companion case of *Madsen v. Women's Health Center, Inc.*, No. 93-880).

Respondents' argument is that petitioners lacked party status in the proceedings in the Supreme Court of Florida and therefore lacked the ability to seek review of that decision. The flaw in respondents' reasoning is the inaccuracy of its premise. Contrary to respondents, petitioners were in fact parties to the state supreme court proceedings. To see this it is necessary briefly to review the history of this case.

Background

Women's Health Center, Inc., *et al.* (hereafter "WHC *et al.*"), plaintiffs in the state circuit court and Respondents in this Court, obtained an amended permanent injunction in the Florida circuit court against a variety of defendants, including both the present petitioners OR *et al.* and the petitioners in *Madsen v. Women's Health Center, Inc.*, No. 93-880. That amended permanent injunction, which the Supreme Court of Florida later affirmed, is now the subject of two petitions for certiorari in this Court: this one (No. 93-833), filed by OR *et al.*; and another one (No. 93-880), filed by a separate set of individuals, Judy Madsen, Ed Martin, and Shirley Hobbs (hereafter "Madsen *et al.*"), who were also defendants in the state circuit court.

After the state circuit court issued its amended permanent injunction, defendants Madsen *et al.* and defendants OR *et al.* elected to pursue separate appeals to the Fifth District Court of Appeal of Florida. Under the Florida Rules of Appellate Procedure, each set of appellants remained party to the other appellants' appeal. The Florida rules designate as an "appellee" in a case "*Every* party in the proceeding in the lower tribunal other than an

appellant," Rule 9.020(f), Fla. R. App. P. (emphasis added). Thus, the appeal of defendants Madsen *et al.* brought with it *both* the plaintiffs WHC *et al. and* fellow defendants OR *et al.*[2] Likewise, the subsequent, separate appeal of defendants OR *et al.* brought with it *both* the plaintiffs WHC *et al. and* fellow defendants Madsen *et al.*[3]

After appealing, Madsen *et al.* successfully petitioned for certification of the case to the Supreme Court of Florida, which accepted jurisdiction. This step simply transferred the proceedings in the first appeal, in their entirety, from the Fifth District Court of Appeal to the Supreme Court of Florida. *See* Rule 9.125(g), Fla. R. App. P. Thus, both WHC *et al.* and OR *et al.* remained parties to the proceedings in the state supreme court.[4]

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[2] Respondents state, without citing anything to support the assertion, that OR *et al.* "objected to being included in the first appeal." Br. Opp. at 1. In fact OR *et al.* objected only to any claim by attorney Mathew Staver, counsel for Madsen *et al.*, to *represent* OR *et al.* OR *et al.* obtained separate representation and filed a separate notice of appeal in order to preserve their right to present arguments through counsel of their choosing. This *representational* objection to the Staver appeal cannot override the *procedural* mandate of the Florida Rules of Appellate Procedure that all parties to the lower court proceeding remain parties to the appeal. Staver's appeal, after all, was unquestionably valid as to Madsen *et al.*, i.e., as to those defendants who did authorize Staver to represent them.

[3] This practice of automatically bringing all parties to a lower court proceeding before the reviewing court is precisely the practice this Court follows. *See* Rule 12.4 ("All parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this Court . . ." and "All parties other than petitioners shall be respondents . . .").

[4] It is therefore not at all surprising that the Supreme Court of Florida permitted OR *et al.* to file a brief as "Certain Respondents/Appellants" instead of requiring OR *et al.* to appear as *amici*. *See* Appendix A. (The term "respondents" on this document refers to "defendants" in a trial court equity action.)

Both Madsen *et al.* and OR *et al.* urged the state supreme court to reverse the injunction.

The Supreme Court of Florida affirmed. In its opinion affirming the injunction, the state supreme court drew no distinction between OR *et al.* and Madsen *et al.* Instead, the court simply referred to "Operation Rescue and others (Operation Rescue)," Pet. App. 1a, and referred to all of the defendants-appellants generically as "Operation Rescue," *see id.* at 10a, 12a, 14a, 16a, 18a-21a, 23a. Indeed, the state supreme court described the appeal before it as having been taken by Operation Rescue, *id.* at 10a, and described the matter before it as "the trial court's order," *id.*, not the appeal of only certain parties. Clearly, the Supreme Court of Florida was—properly—adjudicating the case as to the plaintiffs and *both* groups of appellants, i.e., both Madsen *et al.* and OR *et al.*[5]

OR *et al.* (No. 93-833) and Madsen *et al.* (No. 93-880) then filed separate, timely petitions for certiorari in this Court.

Conclusion

Plainly, both set of petitioners have standing to seek review, in this Court, of the adverse judgment of the Supreme Court of Florida.

For the reasons stated in the Petition for Writ of Certiorari, this Court should grant review.

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[5] Respondents point to the fact that the Florida Fifth District Court of Appeal is still treating the second and separate appeal of petitioners OR *et al.* as requiring adjudication. But the status of the *second* appeal has no bearing on the party status of OR *et al.* in the *first* appeal. Petitioners OR *et al.* believe that the Supreme Court of Florida has *de facto* granted an earlier motion by respondents to consolidate the two appeals. *See* Pet. at 6. But the resolution of this question has bearing only upon the status of proceedings in the District Court of Appeal. Whether the two appeals were consolidated or not is irrelevant to the party status of OR *et al.* in the original appeal of Madsen *et al.*, and thus is irrelevant to the capacity of OR *et al.* to seek review, in the present petition, of the judgment of the Supreme Court of Florida.

Respectfully submitted,

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Attorneys for Petitioners

January 10, 1994

APPENDIX

SUPREME COURT OF FLORIDA

Friday, August 6, 1993

Case No. 81,905

OPERATION RESCUE, *et al.*
Appellants,

vs.

WOMEN'S HEALTH CENTER, INC., *et al.*
Appellees.

Motion Of Certain Respondents/Appellants For Leave To File Brief is granted, and the brief for Operation Rescue, Patrick Mahoney, Randall Terry and Bruce Cadle has been filed with the Court.

A TRUE COPY
TEST:

SID J. WHITE, Clerk
Supreme Court of Florida

By: s/ Barbara D. Maxwell
Deputy Clerk

[SEAL]

bdm

cc: Mr. Gerald B. Curington
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